South African Conflict of Law Rule for Validity of Marriage: Law of the Place of Conclusion of Marriage

In the case *Phelan v Phelan* 2007 (1) SA 483 (C) (judgment date 27 July 2006), the High Court of South Africa (Cape Provincial Division) confirmed the conflict of law rule that the place of marriage celebration determines the validity of the marriage. That law applies not only to formal validity, but also to substantial validity, eg whether the parties had the capacity to conclude a valid marriage etc. In this case, the validity of a marriage concluded in New South Wales, Australia was questioned. The parties were ordinarily resident in Ireland at the time of the marriage. One of the spouses had prior to the marriage obtained a divorce order in the Dominican Republic, while neither he nor his ex-spouse had any connection with that country (no domicile, residence, nationality). (It was impossible to divorce in Ireland at the time.) There was no reciprocity regarding the recognition of decrees between the Dominican Republic and Australia. The High Court came to the conclusion that the divorce could therefore not be recognised in Australia and that no valid marriage had come into existence.

The use of the law of the place of marriage celebration to determine validity has the advantage of applying one set of legal rules to both formal and substantive validity. It also reduces the risk of limping marriage, ie the situation where people are married in one country, but divorced in another.

Entry into Force of Parts of the

Children's Act in South Africa

1) Age of majority now 18 in South African law

The entry into force of certain sections of the Children's Act No 38 of 2005 on 1 July 2007 has changed the age of majority in South African law. It is now 18, while it was 21 before (Sec 17 of the Act). This is relevant for the many young South Africans living abroad, but still domiciled in South Africa or still South African citizens. If the conflict of law rule of the country in which they live points to domicile or nationality for the determination of personal status, these people above 18 will now have full contractual capacity in accordance with South African law.

2) Standard for "best interests of a child"

The Children's Act also contains a (lengthy) provision on the standard for "best interests of the child", a concept frequently used in international protection of children, specifically adoption. Such definition is of particular importance in a region which has a growing number of Aids orphans, and where international adoption might increase in future.

Section 7 of the Act states:

> *(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-*
> *(a) the nature of the personal relationship between-*
> *(i) the child and the parents, or any specific parent; and*
> *(ii) the child and any other care-giver or person relevant in those circumstances;*
> *(b) the attitude of the parents, or any specific parent, towards-*
> *(i) the child; and*
> *(ii) the exercise of parental responsibilities and rights in respect of the child;*
> *(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*
> *(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*

(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need for the child-
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's-
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by-
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

EU Draft Reform Treaty: Changes to the Provisions on Judicial Cooperation in Civil Matters

As it is widely known, the European Council of 21/22 June decided to move on after two years of uncertainty due to the difficult ratification process of the Treaty establishing a Constitution for Europe, signed by the Member States in October 2004. It agreed to convene an **Intergovernmental Conference (IGC)**, pursuant to Art. 48 of the TEU, **to draw up a Treaty amending the existing Treaties, in order to introduce into them**, which remain in force, **the most part of the innovations resulting from the 2004 Constitutional Treaty**. As a first, noteworthy change, **the EC Treaty (TEC) should change its name to *Treaty on the Functioning of the European Union***, while the EU Treaty should keep its present name.

The IGC was convened on 23 July 2007 by the Portuguese Presidency, and a **Draft Reform Treaty** was circulated, drawn up in accordance with the mandate agreed upon by the Member States in the European Council of June. The IGC should complete its work as quickly as possible, and in any case before the end of 2007, so as to allow for sufficient time to ratify the resulting Treaty before the European Parliament elections in June 2009. The Portuguese Presidency aims to reach agreement on a text at the informal European Council in Lisbon on 18 October, and sign it off formally at the final European Council of its term, in next December (see an indicative timetable of the Working Party of Legal Experts, set up by the Presidency).

The new Treaty on the Functioning of the European Union (TFEU) will bring a number of modifications to the current Title IV ("Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons"), Part III ("Community Policies"), of the TEC, which provides the legal basis for measures in the field of judicial cooperation in civil matters (see Art. 61(c), Art. 65 and Art. 67(5) of the TEC, as amended by the Treaty of Nice).

As provided by Art. 2, point 60, of the Draft Reform Treaty, **the new Title IV of the TFEU** (included in the Part Three of the Treaty, "Community Policies and Internal Actions"), **with the heading "Area of Freedom, Security and Justice", should keep the structure of the corresponding part of the Constitutional Treaty** (Articles III-257 to III-277), and be divided in five chapters:

- Chapter 1: General provisions
- Chapter 2: Policies on border checks, asylum and immigration
- Chapter 3: Judicial cooperation in civil matters
- Chapter 4: Judicial cooperation in criminal matters
- Chapter 5: Police cooperation

Chapter 3, which deals with judicial cooperation in civil matters, should consist of a single provision, Art. 69d, reading:

> ***CHAPTER 3 – JUDICIAL COOPERATION IN CIVIL MATTERS***
>
> ***Article 69d***
>
> *1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*
>
> *2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:*
> *(a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;*
> *(b) the cross-border service of judicial and extrajudicial documents;*
> *(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;*
> *(d) cooperation in the taking of evidence;*
> *(e) effective access to justice;*
> *(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure*

applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

4. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.
This proposal shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

The provision is **almost identical to Art. III-269 of the Constitutional Treaty**, with some minor adjustments and a major change: as regards the former, Art. 69d of the TFEU refers to "measures" adopted by the European Parliament and the Council, "acting in accordance with the ordinary legislative procedure" (the codecision procedure set out in Art. 251, as amended by Art. 2, point 242, of the Draft Reform Treaty), while in Art. III-269 reference was made to "European laws" and "Framework laws", the legislative acts replacing regulations and directives in the Constitutional Treaty (see Art. I-33 ff.).

A major innovation is the **power of veto granted to national Parliaments**, pursuant to the second part of Art. 69d(4), **as to the activation of the "passerelle" clause in respect of aspects of family law** which may be subject of acts adopted by the ordinary legislative procedure, following a decision by the Council on a proposal from the Commission: in this respect, each national Parliament can make known its opposition to the "passerelle". The provision should be read in conjunction with new Protocol n. 1 to the TFEU and TEU, on the role of national Parliaments in the European Union, which aims at a greater involvement of these institutions of the Member States in the activities of the EU.

A significant difference between the current text of Art. 65 TEC and the draft Art.

69d of the TFEU can be found in the link of the measures to be taken in the field of judicial cooperation in civil matters with the "proper functioning of the internal market": while these measures, according to Art. 65 TEC, can be taken only "in so far as necessary for the proper functioning of the internal market", Art. 69d TFEU (along with Art. III-269 of the Constitutional Treaty) is far less stringent in respect of this requirement, stating that they can be adopted **"particularly when necessary for the proper functioning of the internal market"**. On the issue, see a short article (in Spanish) by *Prof. J.D. González Campos* (Universidad Autónoma de Madrid), commenting Art. III-269 of the Constitutional Treaty, published in the Spanish electronic journal *REEI – Revista Electrónica De Estudios Internacionales* (n. 9/2005): "La Constitución Europea y el Derecho internacional privado comunitario: ¿un espacio europeo de justicia en materia civil complementario del mercado interior?".

As regards the territorial scope of application of Title IV of the TFEU, there's **no substantial change to the opting-in system currently in force for UK and Ireland**, pursuant to Protocol n. 4 to the TEC on the position of these States in respect of the area of freedom, security and justice: see point n. 19 of the sole article of Protocol n. 11 to the Draft Reform Treaty, amending various protocols to the TEC and the TEU.

The special regime set out by Protocol n. 5 to the TEC on the **position of Denmark** is also maintained, but it can be changed at any time, upon notification by Denmark to the other Member States, with a more flexible one, similar to UK and Ireland (see the new Annex to Protocol n. 5, added by point n. 20 of the sole article of Protocol n. 11 to the Draft Reform Treaty, referred to above). As a result, **Denmark could have as well the possibility of opting-in to each specific measure** adopted pursuant to Title IV, on a case-by-case basis.

As a last remark, it must be pointed out that the special conditions provided by current Art. 68 TEC as regards the **jurisdiction of the European Court of Justice on Title IV** and acts of the institutions based on it should be set aside by the Draft Reform Treaty: accordingly, **the ordinary regime of Art. 234 TEC will apply**.

The text of the new TFEU can be read in its entirety, as resulting from the amendments provided by the Draft Reform Treaty, in a French version edited by *Marianne Dony* (Université Libre de Bruxelles).

All the documents relating to the Intergovernmental Conference are available in a special section of the Council's website.

(Thanks to Jean Quatremer, Coulisses de Bruxelles blog, for providing the link to the French consolidated text of the TFEU)

The Grant of an Anti-Suit Injunction in Connection with a Contract Governed by English Law

NIGEL PETER ALBON (T/A N A CARRIAGE CO) v (1) NAZA MOTOR TRADING SDN BHD (A company incorporated with limited liability in Malaysia) (2) TAN SRI DATO NASIMUDDIN AMIN [2007] EWHC 1879 (Ch). *The Lawtel summary*:

The applicant (Y) applied for an injunction restraining the respondent Malaysian company (N) from pursuing arbitration proceedings in Malaysia. Y alleged that the underlying agreement between the parties was an oral agreement made in England subject to English law. N alleged that there was a joint venture agreement signed by the parties in Malaysia governed by Malaysian law and containing a provision for arbitration in Malaysia. N denied concluding the English agreement as alleged by Y. Y contended that his signature on the joint venture agreement had been forged. Y had obtained permission to serve the proceedings out of the jurisdiction and an order for alternative service. N had applied unsuccessfully for a stay of proceedings in favour of arbitration proceedings in Malaysia, the court holding that the issue of the authenticity of the joint venture agreement should be determined by the English court rather than in the arbitration proceedings. Y had obtained on an application without notice an order restraining N from pursuing the arbitration proceedings in Malaysia but that injunction had been discharged as the sanction for failure by Y to comply with a court order. Y then made a further application for an injunction. Y

contended that the court had jurisdiction to grant an anti-suit injunction and should grant an injunction barring N from taking any further steps in the arbitration proceedings pending the outcome of the English proceedings. N contended that the relief should be limited to barring N from inviting the arbitrators to rule on the authenticity of the joint venture agreement but should leave it to the arbitrators to decide whether to proceed with the arbitration in the interim without prejudice and subject to any determination by the English court on the issue of authenticity and accordingly of the arbitrators' jurisdiction.

Lightman J. held that the grant of an anti-suit injunction in connection with a contract governed by English law was a claim made in respect of the latter contract within CPR r.6.20(5)(c), *Youell v Kara Mara Shipping Co Ltd* (2000) 2 Lloyd's Rep 102 applied. If that was wrong, the court had jurisdiction to grant an anti-suit injunction on the basis of N's application for a stay, *Glencore International AG v Metro Trading International Inc* (No3) (2002) EWCA Civ 528, (2002) 2 All ER (Comm) 1 considered. N was a foreign party brought into the jurisdiction by answering a claim within CPR r.6.20: it had not willingly submitted to the jurisdiction without reservation and it had not brought a counterclaim. But it had applied for a stay, and that application was ongoing and required the court to adjudicate on the authenticity of the joint venture agreement.

In those circumstances, the court had power to protect its processes in the course of and for the purposes of determining the claim to the stay, and that included where necessary the power to grant an injunction restraining N from taking steps within or outside the jurisdiction which were unconscionable and which might imperil the just and effective determination of the claim to the stay, *Grupo Torras SA v Al-Sabah (No1)* (1995) 1 Lloyd's Rep 374 considered. The pleaded claim to an injunction fell within the gateway relied on and the necessary permission was granted to serve the amended claim form and amended particulars of claim in Malaysia. (2) The injunction sought was necessary to protect the interests of Y in the instant proceedings. For N to prosecute the arbitration proceedings or to allow the arbitrators to proceed with them pending determination whether N had forged Y's signature on the joint venture agreement was to duplicate the instant proceedings. That was oppressive and unconscionable, *Tonicstar Ltd (t/a Lloyds Syndicate 1861) v American Home Assurance Co* (2004) EWHC 1234 (Comm), (2005) Lloyd's Rep IR 32 considered. Both sets of proceedings would be concerned with exactly the same subject-matter, *Elektrim SA v Vivendi Universal*

SA (2007) EWHC 571 (Comm), (2007) 2 Lloyd's Rep 8 considered. The court declined to frame the injunction so as to leave it open to N to proceed with the arbitration inviting the arbitrators to determine what, if any, steps to take in the interim and without prejudice to the determination of authenticity by the English court.

View the full judgment on BAILII. *Source: Lawtel*.

Another article on Spider-in-the-Web doctrine after Roche ruling

Matthias Rößler's article "The Court of Jurisdiction for Joint Parties in International Patent Disputes" published in the *International Review of Industrial Property and Copyright Law (IIC)* Number 4, 2007, pp. 380-400, discusses a recently much debated issue related to the enforcement of international patent disputes against multiple defendants. The abstract of the article states:

> The paper discusses the development – and decline? – of the so-called "Spider-in-the-Web" rulings relating to the simplified filing of lawsuits against several cooperating companies in proceedings for the infringement of respective national patents in Europe. It shows the efforts and arguments that have been used in order to be able to apply Art. 6(1) of Council Regulation No. 44/2001 in cross-border patent disputes, and explains how the much-awaited *Roche* decision of the European Court of Justice brought clarity to the issue, yet not a globally viable solution.

The article is accessible on-line via the Beck-Online site.

Here are some of the previous references to the related issues posted here previously: Court Limits Extraterritoriality of Federal Patent Law, U.S. Federal Courts and Foreign Patents: Recent Decisions Affecting the Global Harmonization of Patent Law, CLIP papers on Intellectual Property in Brussels I and Rome I Regulations, Last Issue of Revue Critique de Droit International Privé, Patent Litigation in the EU – German Case Note on "GAT" and "Roche", Is Cross-Border

Relief in European Patent Litigation at an End?, Jurisdiction over Defences and Connected Claims, Jurisdiction over European Patent Disputes, and the European Payment Procedure Order.

American and European Approaches to Personal Jurisdiction Based Upon Internet Activity

Richard D. Freer has posted "**American and European Approaches to Personal Jurisdiction Based Upon Internet Activity"** on SSRN. The abstract reads:

> *The law of personal jurisdiction determines what states or countries may enter a binding judgment against a civil defendant. Without personal jurisdiction over the defendant, a court is powerless to act.*
>
> *While principles of personal jurisdiction are well established in the United States and the European Union (EU), these principles were developed before the widespread use of the Internet, and neither the Supreme Court nor the European Court of Justice has spoken on how the established principles apply in the context of the Internet.*
>
> *American law requires that a defendant engage in purposeful availment of the forum where she is sued, so a defendant is subject to suit only in a forum with which she has established purposeful ties. In contrast, the EU grants personal jurisdiction where the injury occurred, regardless of whether the defendant purposefully availed itself of that place.*
>
> *The difference in approach will prove to be most important in cases involving relatively passive Web site use. So if a defendant posts something on a Web site*

in State A, which is accessible around the world, and a plaintiff is hurt in some way by that posting in State B, may the plaintiff sue the defendant in State B? EU law should provide a positive answer, because their focus is on accessibility and where the harm occurs. In the United States, lower courts have reached inconsistent results, mainly because of the Supreme Court's failure to resolve an important jurisdiction question in a 1987 case involving the "stream of commerce." The Web site case is the modern technological iteration of the stream of commerce which the Court failed to resolve in 1987.

The article is available to download, for free, from **here**.

Shielding Local Law and Those it Protects from Adhesive Choice of Law Clauses

William J. Woodward Jr has posted "**Constraining Opt-Outs: Shielding Local Law and Those it Protects from Adhesive Choice of Law Clauses**" on SSRN (originally published in the *Loyola of Los Angeles Law Review, Vol. 40, No. 1, 2006*). Here's the abstract:

Fifty years ago, the idea that parties could "choose" the law governing their contract was alien to the way most courts viewed their roles. Applicable law depended on complicated conflict of laws rules, administered by judges who would apply the law, not on party choice. Contemporary contracts, by contrast, nearly always specify the law that will govern them. Choice of law clauses reduce uncertainty, contribute to economic welfare and, in most instances, are no longer controversial. But when we move from negotiated contracts to adhesion and mass market contracts, choice of law clauses can become less than benign. A drafter will, of course, choose law that best suits its needs. But the law that best suits the drafter may well be less than ideal for the customer. Not surprisingly, recent cases reveal that mass market drafters often choose

the law of a state that offers very limited protection for customers in their dealings with the drafter. Cases show, for example, that drafters choose the law of a state that recognizes adhesive class action waivers over the law of a state that does not. If such a choice of law provision is effective against customers whose law ordinarily protects them from such waivers, the drafter has effectively replaced the law their state crafted to protect its residents with the less-beneficial law the drafter chose. This, of course, raises policy questions and both courts and state legislatures have begun to address them. How can a state "protect" the law it has developed to benefit its residents without jeopardizing the commercial certainty that choice of law provisions provide? After providing an analytic framework for considering the complex issues raised by this amalgam of conflicts and contract law, we proceed to consider solutions both at the state and federal level.

Download the full article from **here**.

Characterisation and liberative prescription/limitation in South Africa

South African academics welcome the outcome of the decision of the Supreme Court of Appeal in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) (which may be downloaded from www.supremecourtofappeal.gov.za). See Forsyth "'Mind the gap' part 2: The South African Supreme Court of Appeal and characterisation" 2006 *Journal of Private International Law* 425-431 and Neels "Tweevoudige leemte: Bevrydende verjaring en die internasionale privaatreg" 2007 *Tydskrif vir die Suid-Afrikaanse Reg [TSAR] / Journal of South African Law* 178-188.

The case dealt with the scenario that the limitation rules of the *lex causae* (English law) were of a procedural nature according to both the *lex causae* and

the *lex fori*, the prescription rules of the *lex fori* being of a substantive nature (according to the *lex fori*). The court applied the rules of the *lex causae.* The court *a quo*, the Transvaal High Court, applied the rules of the *lex fori*: see *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2005 3 SA 549 (T). In a similar case, the Cape High Court applied the *lex causae*: *Society of Lloyd's v Romahn* 2006 4 SA 23 (C).

Forsyth welcomes the court's adoption of Falconbridge's *via media* characterisation technique but Neels is in favour of a simple rule that liberative prescription is a substantive issue governed by the *lex causae*, irrespective of how the *lex causae* classifies its own liberative prescription or limitation rules (including such characterisation in terms of the domestic *lex causae* and such classification in terms of the private international law of the *lex causae*).

Second Issue 2007 of "Rivista di diritto internazionale privato e processuale"

The second issue for 2007 of the *Rivista di diritto internazionale privato e processuale* (*RDIPP*, published by CEDAM, Padova), one of Italy's leading journals in private international law, has been recently published. All the articles in this issue are in Italian, and unfortunately just an English translation of the titles is available, but no abstract. Here's the list:

ARTICLES

- *A. Malatesta* (University of Castellanza "Carlo Cattaneo" – LIUC), The State of Origin Principle and Conflict of Law Provisions after Directive 2006/123/EC on Services in the Internal Market: Is the Game Over? (Principio dello Stato di origine e norme di conflitto dopo la direttiva 2006/123/CE sui servizi nel mercato interno: una partita finita?);
- *A. Bonomi* (University of Lausanne), Some Issues on the Desirability of

Erga Omnes Community Rules on Jurisdiction and Possible Solutions (Sull'opportunità e le possibili modalità di una regolamentazione comunitaria della competenza giurisdizionale applicabile erga omnes).

COMMENTS

- *V. Colandrea* (University of Naples "Federico II"), A Recent Arbitral Order of the International Chamber of Commerce on Cautio Iudicatum Solvi (La cautio iudicatum solvi alla luce di una recente ordinanza arbitrale della Camera di commercio internazionale);
- *S. Crespi* (University of Milan), Cross-Border Mergers before the EC Court of Justice: the Sevic Case (Le fusioni transfrontaliere davanti alla Corte di giustizia: il caso Sevic).

The *RDIPP* is not available online (for subscription information, refer to the publisher's website, CEDAM).

An archive of the TOCs since 1998 is available on the ESSPER website (an online project for indexing articles of Italian journals and working papers in law and other social sciences, headed by the library of LIUC University of Castellanza).

Determining the Enforceability of an English Court Order Varying a Jersey Trust: Limitation, Legal Basis and Comity

Jonathan Harris has written an article in the new issue of the *Jersey and Guernsey law Review* entitled "**Comity overcomes statutory resistance: In the Matter of the B Trust**" (*J.G.L.R.* 2007, 11(2), 184-201). The article:

> *Comments on the Jersey Royal Court judgment in Re B Trust on the application of the Trusts (Amendment No.4) (Jersey) Law 2006 Art.9 to determine the*

enforceability of an English court order varying a Jersey trust. Considers whether Art.9(4), limiting the enforcement of foreign judgments against Jersey trusts, had sufficient legal basis. Assesses whether the English order should be given effect on the basis of comity.